IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

NO. 78-814

EDDIE THOMPSON, JR.,
Plaintiff-Petitioner,

v.

COVINGTON HOUSING DEVELOPMENT CORP.,
Defendants,

and

JOSEPH CONDIT,
JUNE HEDRICK,
Defendants-Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

EDDIE THOMPSON, JR., Pro Se

736 Highland Avenue
Covington, Kentucky 41011
1-606/491-6278

I hereby certify that 3 copies of the foregoing petition have been served by the United States mail, upon: Mr. Charles Wagner, City Solicitor's Office, City-County Building, Covington, Kentucky 41011 on this ..... day of November, 1978.

.....
Eddie Thompson, Jr., Pro Se

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CITATIONS

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner, Eddie Thompson, Jr., respectfully prays that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the Sixth Circuit entered in the above styled case on September 18, 1978 (App. p. 9a); petition for rehearing denied on October 18, 1978. Mandate issued on October 31, 1978 (App. pp. 9a-10a).

OPINION BELOW

The opinion of the United States District Court for the Eastern District of Kentucky – Covington was entered on October 5, 1978.

JURISDICTION

The jurisdiction of this court is invoked pursuant to 28 U.S.C. 1254 (1). The order appealed from being entered on September 18, 1978; rehearing denied October 18, 1978. (App. pp. 9a-10a and 11a).

QUESTIONS PRESENTED

(1) Can a Court of Appeals issue a mandate without having jurisdiction of an appeal.

(2) In a derivative suit, is the dismissal of all the defendants except the corporate defendant a de facto dismissal of the derivative suit.

(3) Is it an abuse of discretion for a Court of Appeals to have jurisdiction on appeal, but refuse to take the case and decide it.

(4) Where appellant is entitled to an appeal as matter of right, is it a denial of due process of law when the Court of Appeals refuses to grant that right.

(5) Are employees of a Model Cities program entitled to pay they have earned, but have not received.

STATEMENT

This is the second time this case is before this court. Defendant Covington Housing Development Corporation is and/or was an operating agency for the City of Covington in its Model Cities program by virtue of a contract entered into on October 5, 1972. By virtue of that contract, the Covington Housing Development Corporation's Board of Directors hired Eddie Thompson, Jr., a black, as Executive Director. As a result of the Board of Directors' hiring a black as Executive Director, Joseph Condit (City Finance Director), June Hedrick (Model Cities Director), and Paul Royster (City Manager) successfully conspired to illegally terminate the project. *Covington Housing Development Corp., et al.* v. *City of Covington, et al.,* 381 F Supp 427, Aff'd by unpublished opinion 513 F 2d 630, Cert. Den. 423 U.S. 869.

Subsequently, Thompson as Executive Director had engaged counsel to bring suit on behalf of the Corporation for reinstatement of the project and back pay of the staff. (The City was illegally withholding salary for the Executive Director and his staff.) This salary had already been earned.

Mr. Condit who was also acting as counsel for the defendants was able to prevail upon counsel employed by Thompson not to pursue the matter. Mr. Condit also prevented counsel employed by Thompson from attending the depositions of Mr. Broadus Blythe and Eddie Thompson, Jr.

Later, defendant/attorney Condit misrepresented himself in a fraudulent manner to the District Court. This resulted in the case being dismissed on September 11, 1974.

Without knowing the facts, Eddie Thompson, Jr. attempted to engage other counsel for the Corporation, to no avail. Thereafter, Eddie Thompson, Jr. attempted to represent the Corporation and himself. Thompson was a nominal party in the original suit. Thompson perfected an appeal to the Sixth Circuit Court of Appeals, which affirmed the District Court in an unpublished opinion. *Covington Housing Development Corp., et al.* v. *City of Covington, et al.,* 513 F 2d 630.

Thompson then petitioned the Supreme Court to no avail.

Thompson then made additional demands of Ms. Hedrick and Mr. Condit (who had now become City Manager) for his wages and the wages of his staff, to no avail. Hedrick and Condit claimed the corporation owed Thompson and his staff. But Hedrick and Condit had caused the Corporation to become defunct. Hedrick and Condit also recommended to the Mayor and Commissioners that Thompson and his staff not be paid.

Subsequently, as a director (Executive Director) and as an employee of the Corporation, Eddie Thompson, Jr. filed a derivative action in District Court on May 11, 1977. Condit and Hedrick filed a Motion to Dismiss claiming Res judicata based on the original suit.

On October 5, 1977, without a hearing, the District Court sustained Condit and Hedrick's Motion on bases of Res judicata, but left case pending as to defendant Covington Housing Development Corporation. On October 12, 1977, plaintiff Thompson moved the Court to amend its order and/or to certify question of law to permit appeal. Attorney for Condit and Hedrick did not reply to said Motion.

On October 25, 1977, the Court held a hearing, but summarily overruled plaintiff's Motion — no reason given. (App. p. 8a).

Subsequently, a Notice of Appeal was timely filed and the case was filed in the Court of Appeals on November 21, 1977. On or about December 22, 1977, defendants-respondents filed their Brief.

Petitioner's contentions are; (1) that the District Court erred in dismissing Condit and Hedrick on bases of Res judicata, (2) that dismissal without a hearing was a denial of due process, (3) that the Court of Appeals' refusal to take appeal and decide it was an abuse of discretion, and (4) that the Court of Appeals erred by issuing a mandate.

The Court of Appeals' Mandate is the equivalent of an affirmance of the Trial Court's decision, was erroneous, and an abuse of discretion by the Court of Appeals.

REASONS FOR GRANTING THE WRIT

The Motion to Dismiss performs the same function as the old general demurrer in that it admits the well pleaded material allegations of the complaint. *Cruz* v. *Betts,* 31 LEd 2d 263. Due process has always implied a hearing.

The grounds for dismissal for lack of appellate jurisdiction . . . "ordinarily may be (1) that the judgment of the District Court was not a decision upon a 'claim for relief', (2) that the decision was not a 'final decision' in the sense of an ultimate disposition of an individual claim entered in the course of a multiple claims action, or (3) that the District Court abused its discretion in certifying the order." *Sears* v. *Mackey,* 100 LEd 1297. In the instant

case the Court of Appeals dismissed without following any of the above criteria.

Appellees-respondents do not rely on any of the above criteria. In fact, on its own initiative the Court of Appeals claims it had no jurisdiction, yet the Court of Appeals issued a Mandate dismissing Condit and Hedrick. This is obviously an error by the Court of Appeals.

Arguendo the District Court was right in dismissing Condit and Hedrick. Then the procedure in the Court of Appeals would have been an affirmance of the District Court's decision.

In *Gillespie* v. *United States Steel Corp.*, the Supreme Court held that the Court of Appeals for the Sixth Circuit did not err in holding that the Trial Court's order was "final" and therefore appealable under 28 U.S.C. 1291, because the inconvenience and cost of the case would not be greater by deciding the appeal, a delay would result from refusing to decide the appeal, and the questions raised were fundamental to further conduct of the case. *Gillespie* v. *U.S. Steel Corp.*, 13 LEd 2d 199.

Traditionally, this court has held that "the requirement of finality as a prerequisite of jurisdiction of a court of appeals to entertain appeals from all final decisions of a federal court is to be given a practical rather than a technical construction; the inquiry requires some evaluation of the competing considerations underlying all question of a finality, that is, the inconvenience and cost of piecemeal on one hand and the danger of denying justice on the other. *Eisen* v. *Carlisle and Jacquelin*, 40 LEd 2d 732; *Cohen* v. *Beneficial Industrial Loan Corp.*, 93 LEd 1528; *Dibella* v. *United States*, 7 LEd 2d 614; *Gillespie* v. *U.S. Steel Corp.*, 13 LEd 2d 189; *Sears* v. *Mackey*, 100 LEd 1297.

Rule 54 (b) of Federal Rules of Civil Procedure . . . which permits the entry of a judgment upon one or more but less than all of the claims in a multiple claims action is valid . . . it does not supersede any statute controlling appellate jurisdiction and recognizes the statutory requirement of a "final decision" under 28 U.S.C. 1291 as a basic requirement for an appeal to the Court of Appeals . . . is valid both as to its negative effect, where the court refuses to make the requisite determination and direction, and as to its affirmative effect, where the Court does make such determination and direction. *Sears* v. *Mackey*, supra.

In *Gillespie* v. *U.S. Steel Corp.*, supra, the Supreme Court held the meaning of 28 U.S.C. 1291 is frequently so close a question that decision of that issue either way can be supported with equally forceful arguments, and that it is impossible to devise a formula to resolve all marginal cases coming within what may be called the "twilight zone" of finality. Because of this difficulty, the Supreme Court has held that the requirement of finality is to be given a "practical" rather than a technical construction.

However in the instant case, defendants-appellees offered no brief or arguments that the present order is not final, but insist that the District Court sustained their Motion to Dismiss on the basis of Res judicata.

A claim by defendants-appellees and some citations that a decision is not final may be a defense in a scheme or game, but no such claims is made here.

"The federal rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive of the outcome, and accept the principal that the purpose of pleading is to facilitate a proper decision on the merits." *Conley* v. *Gibson*, 2 LEd 2d 80.

The arbitrary dismissal of the appeal pursuant to Court of Appeals Rule 9 (b) 1 and the issuance of a Mandate would be the equivalence of affirming the dismissal by the District Court and would be contrary to Rule 11 of the Sixth Circuit Court of Appeals. The action by the Court of Appeals would further deny appellant-petitioner due process of law.

CONCLUSION

This Court should grant the Petition for Writ of Certiorari and hear issue raised in this important case.

"A plea of estoppel admits the cause of action and, if the estoppel fails, judgment follows; of course for the other party. One must rely either on the estoppel as such or upon the truth of the matter. *Southern R.P. Co.* v. *United States*, 42 LEd 355.

EDDIE THOMPSON, JR., Pro Se

APPENDIX

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
COVINGTON

CIVIL ACTION NO. 77-35

EDDIE THOMPSON, JR.,
PLAINTIFF,

vs.

COVINGTON HOUSING DEVELOPMENT CORPORATION, ET AL.,
DEFENDANTS.

ORDER

(Filed October 5, 1977)

In accordance with the Memorandum Opinion of even date, it is

ORDERED AS FOLLOWS:

1. The defendants', Condit's and Hedrick's, motion to dismiss this action as barred by the statute of limitations is hereby sustained as to the plaintiff's causes of action under 42 U.S.C. §§ 1985 and 1986, and overruled as to the plaintiff's claim under 42 U.S.C. §§ 1981 and 1983.

2. The defendants', Condit's and Hedrick's, motion to dismiss this action on the basis of res judicata is hereby sustained.

3. This case be and is dismissed as to the defendants, Condit and Hedrick, but shall remain on the docket as of the remaining defendant, Covington Housing Development Corporation.

This 5 day of October, 1977.

/s/ EUGENE E. SILER, JR.,
JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
COVINGTON

CIVIL ACTION NO. 77-35

EDDIE THOMPSON, JR.,
PLAINTIFF,

vs.

COVINGTON HOUSING DEVELOPMENT CORPORATION, ET AL.,
DEFENDANTS.

MEMORANDUM OPINION
(Filed October 5, 1977)

This civil rights action was instigated by the plaintiff, Eddie Thompson, Jr., pro se, alleging a conspiracy to deprive him and others of wages due and to deprive him

of his job as director of the defendant, Covington Housing Development Board. The matter is before the Court now on motions by defendants, Joseph Condit and June Hedrick, to dismiss this action. Defendants base their motions on the grounds that the Court lacks jurisdiction to hear the case and that the action is barred by the doctrine of *res judicata* and the statute of limitations. Additionally, defendants request that the Court dismiss the suit as a class action and strike certain portions of the complaint which refers to the class plaintiff purports to represent. These issues will be considered separately.

CLASS ACTION

The plaintiff argues that the facts and questions in this suit are common to all members of the class. However, the "class" consists of but four people, the plaintiff and three other former employees of the corporation, all of whom are readily identifiable. The Court cannot find that the proposed "class is so numerous that joinder of all members is impracticable." FED.R.CIV.P. 23 (a). Therefore, the action will not be certified as a class action and any recovery will be limited to injuries sustained by the named plaintiff.

STATUTE OF LIMITATIONS

The complaint alleges that the illegal actions occurred in late 1972 and in the spring of 1973. This action was filed on May 11, 1977. The defendants argue that the action is barred by the statute of limitations.

This argument is clearly well taken as to the plaintiff's cause of action under 42 U.S.C. § 1986. The last sentence of that section provides that "no action under the

provisions of this section shall be sustained which is not commenced within one year after the cause of action has accrued."

The plaintiff also brought the action under 42 U.S.C. §§ 1983 and 1985. Because a statute of limitation for these sections is not contained either in the Civil Rights Act or elsewhere in the federal statutes, the applicable period of limitation is that which Kentucky would enforce had an action seeking similar relief been brought in Kentucky state court. *Garner* v. *Stephens,* 460 F.2d 1144 (6th Cir. 1972). The question before the Court is, therefore, which Kentucky statute of limitations is appropriate for actions under §§ 1983 and 1985.

The plaintiff cites *Kentucky-Tenn. L.&P. Co.* v. *Moats,* 290 Ky. 690, 162 S.W.2d 526 (1942), as authority that the five year statute of limitations applies to actions earned and unpaid. (§ 2515, Kentucky Statutes). However, KRS 413.120, which replaced § 2515, contains no provision for an action on wages. In any event, such a suit would be considered an action on a contract and, inasmuch as there is not diversity of citizenship of the parties, this Court would have no jurisdiction to hear the case.

Defendants assert that the one year statute of limitations for conspiracy contained in KRS 413.140 (1) (c) is controlling. The Court finds that this statute does not bar the plaintiff's claim under 42 U.S.C. § 1985.

However, there remains plaintiff's claim under 42 U.S.C. §§ 1981 and 1983. The applicable Kentucky statute of limitations for this cause of action appears to be KRS 413.120 (2):

> The following actions shall be commenced within five years after the cause of action accrued:
>
> . . .

> (2) An action upon a liability created by statute, when no other time is fixed by the statute creating the liability.

Therefore, the defendants' motions to dismiss based on the fact that this action is barred by the statute of limitations will be sustained for the plaintiff's causes of action under 42 U.S.C. §§ 1985 and 1986, but overruled as to the plaintiff's claim under 42 U.S.C. §§ 1981 and 1983.

RES JUDICATA

On October 4, 1973, a civil rights action styled *Covington Housing Development Corp. and Eddie Thompson, Jr.* v. *City of Covington, et al.,* was filed in the United States District Court, Eastern District of Kentucky at Covington, as civil action number 1752. Among the named defendants in that suit were June Hedrick and Joe Condit, defendants in the present action. The suit was brought pursuant to 42 U.S.C. §§ 1981 and 1983 and jurisdiction was invoked under 28 U.S.C. § 1343 (3). The corporation alternately sought damages or reinstatement of the development, while plaintiff, Eddie Thompson, Jr., demanded remuneration for the defendants' racist hiring practices and deflamatory allegations of fiscal irresponsibility.

On September 11, 1974, District Judge Mac Swinford, entered Summary Judgment in favor of the defendants based on the finding that (1) the corporation had no authority to bring the action, and (2) the plaintiff, Thompson, had no personal remedy for injuries suffered by the corporation and that the deprivations inflicted on the plaintiff individually were insufficient to justify retention of jurisdiction. 381 F.Supp. 427 (E.D. Ky. 1974), ***aff'd by unpublished opinion,*** 513 F.2d 630 (6th Cir. 1975).

The case was appealed to the Supreme Court, where the plaintiff's Writ of Certiorari was denied on October 6, 1975. 423 U.S. 869.

Defendants now assert that this action is barred by *res judicata*. Although the plaintiff argues that "whether the Director [Thompson] has any personal claim to be resolved by the court was not before the court when it ruled Summary Judgment for defendants against Covington Housing Development Corporation" (plaintiff's reply p. 3), the record, as indicated above, shows otherwise. Both Judge Swinford and the Appellate Court held that plaintiff Thompson, as an individual, suffered no deprivation of his civil rights.

It is a well settled principle that "*res judicata* may be pleaded as a bar, not only as respects matters actually presented to sustain or defeat the right asserted in the earlier proceeding, 'but also as respects any other available matters which might have been presented to that end.' [citations omitted]." *Chicot County Drainage Dist.* v. *Baxter State Bank,* 308 U.S. 371, 378 (1940). See also *All States Investors, Inc.* v. *Sedley,* 399 F.2d 769 (6th Cir. 1968).

This principle was applied to a federal civil rights claim in *Scoggin* v. *Schrunk,* 522 F.2d 436 (9th Cir. 1975), *cert. denied,* 423 U.S. 1066 (1976). In *Scoggin,* the plaintiff first sued in state court in the theories of unjust enrichment and no timely notice of a foreclosure sale. After an unfavorable decision, Ms. Scoggin brought an action under 42 U.S.C. § 1983, seeking the same relief, but for the first time saying her civil rights had been violated by the sale of her property without notice. The District Court held that unless the civil rights claim had actually been tendered to the state court, *res judicata* did not apply. In reversing, the Ninth Circuit held:

> It is now established that where the federal constitutional claim is based on the same asserted wrong as was the subject of a state action, and where the parties are the same, *res judicata* will bar the federal constitutional claim whether it was asserted in state court or not, for the reason that the state judgment on the merits serves not only to bar every claim that was raised in state court, but also to preclude the assertion of every legal theory or ground for recovery that might have been raised in support of the granting of the desired relief.

Id. at 437.

The present case arises out of the same set of facts and involves the same parties as case number 1752. The Summary Judgment which was rendered by Judge Swinford in favor of the defendants goes to the merits of the case and operates as an effective bar to this action. See *Brachett* v. *Universal Life Ins. Co.,* 519 F.2d 1072 (5th Cir. 1975); *Sopp* v. *Gehrlein,* 236 F.Supp. 823 (W.D. Pa. 1964).

An order in conformity with this Memorandum Opinion will be entered this date.

This 5 day of October, 1977.

/s/ EUGENE E. SILER, JR.,
JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
COVINGTON

Case No. 77-35

EDDIE THOMPSON, JR.,

vs.

COVINGTON HOUSING DEVELOPMENT.

CIVIL MINUTES – GENERAL
Date October 25, 1977

PRESENT: Hon. Eugene E. Siler, Jr., Judge
DTM & LGB, Deputy Clerk
McGarvey, Court Reporter

ATTORNEYS PRESENT FOR PLAINTIFFS:
Eddie Thompson, Jr. pro se

ATTORNEYS PRESENT FOR DEFENDANTS:
Charles P. Wagner for Joseph Condit and Juen Hedrick dismissed as defendants per Order 10-5-77

PROCEEDINGS: HEARING:

Plaintiff's Motion for Court to Amend its Order of 10-5-77 and/or for Court to certify question of law to permit appeal is overruled.

Initials of Deputy Clerk LGB

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

77-1716

EDDIE THOMPSON, JR.,

Plaintiff-Appellant,

vs.

COVINGTON HOUSING DEVELOPMENT,

Defendant,

JOSEPH CONDIT and JUNE HEDRICK,

Defendants-Appellees.

ORDER

(Filed September 18, 1978)

BEFORE: WEICK, CELEBREZZE and KEITH, Circuit Judges.

This appeal, perfected from an order of the district court dismissing this civil rights action against only two of the three named defendants, has been assigned to a panel pursuant to Rule 9 (a), Rules of the Sixth Circuit.

It appearing that there is no final appealable order and that this Court is without jurisdiction to consider the present appeal, *William B. Tanner Co., Inc.* v. *United States,* 575 F.2d 101 (6th Cir. 1978); *Moody* v. *Kapica,* 548 F.2d 133 (6th Cir. 1976),

It is ORDERED that the appeal be and it is hereby dismissed. Rule 9 (b) (1), Rules of the Sixth Circuit.

ENTERED BY ORDER OF THE COURT

/s/ JOHN P. HEHMAN,
Clerk

Issued as Mandate: October 31, 1978
COSTS: NONE

[CERTIFICATION OMITTED]

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 77-1716

EDDIE THOMPSON, JR.,
Plaintiff-Appellant,

v.

COVINGTON HOUSING DEVELOPMENT,
Defendant,

JOSEPH CONDIT and JUNE HEDRICK,
Defendants-Appellees.

ORDER
(Filed October 18, 1978)

Before: WEICK, CELEBREZZE and KEITH, Circuit Judges.

Appellant having filed a petition for rehearing en banc with this Court, and no active Judge having requested that a vote be taken on the suggestion for rehearing en banc, said petition has been referred to the panel for disposition. The Court having considered said petition and being duly advised in the premises,

It is ORDERED that the petition for rehearing be, and it is hereby denied.

ENTERED BY ORDER OF THE COURT

/s/ JOHN P. HEHMAN,
Clerk